Pornography, Social Science and the Common Law: From Wagner to Bill C-54 and the Search for Legal and Aesthetic Controls

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Introduction: Expert Testimony and Judicial Activism in the Common Law of Obscenity

In a previous paper dealing with the Wagner decision, we raised what would appear to have been standard methodological questions about the social science studies employed by Mr. Justice Shannon to make a finding which extended the law of obscenity in Alberta. That extension suggested that the community standards of tolerance would not protect obscene materials which had a harmful consequence, and that harmfulness would constitute a sufficient ground for over-riding the protection of expression laid out in the Charter of Rights and Freedoms.[1] In Wagner, rebuttal evidence was led by the Crown to challenge the testimony of a defense witness who suggested that sexually explicit materials were harmless. The Crown witness, Mr. James Check, a York University psychologist, reported that recent experimental work in his field had established that discrete, socially harmful consequences could be traced, first, to sexually explicit materials that linked sex with violence, especially violence directed against women; second, that sexually explicit materials which were degrading or dehumanizing--which depicted women as "deprived of unique human character or identity"--also had been linked to negative consequences, and, third, that explicit erotica which depicted "positive and affectionate human sexual interaction, between consenting individuals participating on the basis of equality," had no negative consequences. The harmfulness of the first two categories was described as follows:

> "both sexually violent pornography and degrading and dehumanizing pornography convey the message that women enjoy abusive and anti-social behaviour. Men who are repeatedly exposed to such films become more sexually aggressive in their relations with women and tolerant of such behaviour in others. This leads to increased callousness towards women on a personal level and less receptiveness to their legitimate claims for equality and respect."

The films at issue were, on the whole, not sexually violent, did not involve children or animals, and were not offensive by virtue of linking sexuality to crime, horror, cruelty or violence--as provided for in s. 159 of the Canadian Criminal Code--and when they did, failed to do so in a compelling manner (i.e. dressing up an adult female as a child). An earlier

prosecution in Calgary aimed at the more bizarre sorts of materials proved judicially irrelevant when the accused pleaded guilty (R. v. CLR Distributors, Calgary Prov. Crt. unreported, 1983). Our inquiries into the case uncovered that the Calgary prosecutor's office had set up a small committee to deal with the pornography problem and was looking for a case to demarcate obscenity more sharply. The examination in chief consisted of showing the court eight out of the more than three hundred films seized by police. The eight films[2] were what is loosely deemed "hard-core"--actual sexual behaviour dressed up in thinly orchestrated plots which led repeatedly to scenes of explicit sex, group sex, non-vaginal sex, external ejaculation, etc. The actors were, according to the Judge, "young men with large, seemingly disembodied penes and young females who adore[d] them and who engage[d] in sex at the drop of a hat, or as I saw in one film, at the drop of a plate." In the words of the trial judge, they were "pornographic sex fantasy films designed to provide sexual stimulation for the viewer."

In our earlier paper, we were concerned with such methodological issues as the use of experimental designs which were problematic in terms of generalizability, using inappropriate samples of persons, conflicting theoretical models, sources of spuriousness, and the like.[3] It is interesting that many of the same objections have been raised by critics of the Meese Commission in the US, including those who conducted some of the original research which, they have argued, was misconstrued or interpreted in a self-serving fashion by certain Commission members.[4] There are several different points to be made about this decision, points which open up the discussion of pornography, social science and the common law. First, we want to situate the decision within similar distinctions drawn in the Fraser, Meese and Klugman inquiries; second, to raise the issue of context in the decision, and how this relates to the pornography-erotica distinction; third, to determine how context functions in related areas of morality law; and finally, to determine how the context issue has become distorted in the way effects evidence is led by the prosecution.

Drawing Meaningful Distinctions: Obscenity versus Pornography in Government Commissions, Legal Reform and Judicial Activism

The classification created by the expert testimony is comparable to that developed in the Meese Commission. Meese differentiated (a) sexually violent material from (b) non-violent material depicting degradation, domination, subordination or humiliation, from (c) non-violent and non-degrading materials, and finally (d) nudity. However, where at least one panelist on Meese--Father Ritter--could find nothing defensible about

explicitness, and found nudity per se objectionable on the ground that it was an invasion of privacy, Justice Shannon adopted a more academic perspective. He created a standard based on experimental findings about film exposure outcomes, as opposed to religious views of moral conduct. He argued that "the contemporary Canadian community will not tolerate either of the first two classes" of materials--sexually violent and sexually degrading--but "will tolerate erotica no matter how explicit it may be." This is an extremely liberal view, especially given the religious constituencies which hold that sex ought to be private, heterosexual, monogamous, and, while not exclusively procreative, it should at least emotionally reinforce the spousal union. This view reflects the Lord Devlin perspective that law is *symbolic*--it exemplifies proper conduct. By contrast, the Shannon stance reflects an *instrumentalist* view of the law: the law is designed to limit harmfulness and control action, not to reflect values. In this respect, the decision arguably follows the official policy document of the Federal Department of Justice--The Criminal Law in Canadian Society--as opposed to the chief document of the Law Reform Commission of Canada--Our Criminal Law. The Law Reform Commission argues that criminal law must be based on values; the Department of Justice assigns priority to limiting harmfulness. The two documents exemplify a basic conflict in the underlying philosophies of criminal law. Interestingly enough, the recommendations of the Fraser Committee, while generally placing priority on the values of equality of women, targetted, in its first tier, visual pornography which caused physical harm to persons in the production ("Snuff" films, and possibly S&M) and, in its second tier, sexually violent and degrading pornography--where degrading appears to have been limited to bestiality, necrophilia or incest. In the third tier, other explicit visual depictions of sexual activities (not involving violence, incest, necrophilia or bestiality), but covering "vaginal, oral or anal intercourse, masturbation, lewd touching of the breasts, or the genital parts of the body, or the lewd exhibition of the genitals" would have been allowed. On the whole, the Fraser Committee took an instrumentalist approach by drawing the line in a fashion which would have exhonerated most of the Wagner films since degradation was constructed so narrowly.

Currently, before the Canadian parliament is Bill C-54, an act designed to revise the Canadian obscenity law. Where the Fraser Committee would have loosened the restrictions covering both pornography and prostitution, the final report, which was commissioned by a liberal administration, received a frosty reception when it was subsequently filed to a conservative administration (as was also the case with the 1970 U.S. Commission, and the 1979 Williams Inquiry in the U.K.). The thrust of the law is to scrap the technical term--obscenity--and to

replace it with the distinction between pornography and erotica. However, that Bill draws the line in a way that would exclude as pornography what Fraser would have allowed. Erotica is confined to the visual depiction of a sexual organ, a female breast or the human anal region for the purpose of sexual stimulation of the viewer. Pornography is defined in a way that reflects the first two tiers described by Fraser, but extends the line to the third tier by defining as pornographic the visual depictions of sexual acts, however perverse or normal. It has been this broad stroke which has resulted in public misgivings about the law, and which would make it vulnerable to Charter challenges. Also worrisome is the liability of written materials that advocate, incite, promote or encourage any of the following--sexual practices involving children under 18 (or persons who appear to be under 18), harmful, painful or violent sexual acts, degrading acts, bestiality and various other paraphilias.

Mr. Justice Shannon's decision is the closest of any in the Canadian common law that approaches what Bill C-54 introduces as statute. It is premised on the same terms--erotica and pornography--and may be more consequential than Bill C-54 since the latter has become an extremely unpopular matter. It also appears to have been more influential than the Fraser recommendations which were largely shelved with the change in governments. If the bill dies on the order papers, as most observers predict, and if no further redrafting of future obscenity reforms take up the Fraser position, then the common law decisions which emulate the philosophy of the proposed law--the demarcation of explicit erotica from two distinctive types of objectionable pornography (violent and degrading)--will introduce this transition in legal thinking through the back door, by establishing that one of the standards applied by the community to determine whether sexual depictions are "undue" under s.159 will reflect the pornography-erotica distinction which has been advanced on ideological grounds by one wing of the feminist movement, fleshed out by social scientists in terms of exposure effects, and introduced to the courts via expert testimony.

Before we develop our other arguments stemming from Wagner, it should be stressed that the Wagner decision is precarious. It is the decision of a trial judge, and, as such, would not, strictly speaking, be formally binding on other judges in the same jurisdiction. The decision of the Alberta Court of Appeal to refuse leave to hear the case, and the decision of the Supreme Court to do likewise, leave the case in a curious limbo. These decisions fall short of upholding the reasoning and applying the standard in the respective jurisdictions (the Province of Alberta versus all of Canada), but do not go as far as actually substantiating it, as would

have been the case if the appeals had been allowed and the trial outcome re-confirmed. The decision was cited bu the B.C. Court of Appeal in Red Hot Video, and now stands as something of a land mark case.[5] One of the reasons given by the Alberta Court of Appeal in its refusal of leave to hear the case was that the substantive matter had already been dealt with in the Supreme Court in the Towne Cinema case. Ironically, one of the authorities cited in Towne Cinema was the Wagner decision--at that time unpublished--so Wagner found himself seeking respite from a judgment which was used simultaneously an an authority for denying him leave to appeal.[6]

The Wagner decision is an interesting example of law reform by judicial decision. It is neither as liberal as Fraser--since it defines degrading pornography so broadly--nor as conservative as Bill C-54--since the latter defines erotica so narrowly. The reason for the difference between Fraser's view and Shannon's appears to be the value attached to the research materials advanced to define pornography instrumentally--i.e. largely in terms of its effects. Where Mr. Justice Shannon took the research at face value, the Fraser Committee was less convinced. Referring to the lab studies and correlational analyses which had been presented before the Committee, it found that "the research is so inadequate and chaotic that no consistent body of information has been established."[7] Obviously, one of the limitations of judicial reforms of the type found in this case is that the judiciary does not possess the resources to investigate an issue thoroughly, or to canvass widely the expertise in an area other than what is put before the court. Unfortunately, in Wagner, the defense experts had been sent home before the rebuttal evidence was led--and, surprisingly to those who attended the trial, it was the rebuttal evidence which formed the basis of the decision, giving the Crown the demarcation for which it was looking. Ironically, in the aftermath of the Meese Commission, the same expertise which informed Mr. Justice Shannon in his decision, has come under critical scrutiny, and the whole relationship between pornography, behaviour and attitudes is being re-examined.

The Issue of Context in Wagner

There are several issues unresolved as a result of Wagner which we would like to re-open to help us think about pornography and how the common law has dealt with it. In advancing the pornography-erotica distinction, Mr. Justice Shannon appears to take the position that the context of representation is irrelevant to the identification of the subject matter. This is intimated where he says "...the video cassette films that I saw, except for "Greenhorn," are obscene and their nature does not change according to the age of the possessor or the location at which they are

displayed." This statement seems to advance the proposition that obscenity is not in any way contextual, that, in some formal sense or inherently, it is as offensive to a mature as to an immature adult, and that warnings about its content, which might be given at the point of distribution or in the theatre lobby, are irrelevant to determining its status.

This position is inaccurate for any student of the law of obscenity for a variety of reasons. First, there does not seem to be an underlying essence which constitutes pornography or obscenity and which can be found commonly in all contemporaneous examples of it. Fraser, Shannon and the current Minister of Justice are all contemporaries and all draw the line differently. The recent Klugman Committee report, On Video Materials, was split virtually down the middle on where to draw the line.[8] And even on Meese, there was a significant dissent, particularly on the issue of the social science contribution to the debate which would assist in where to draw the line. Secondly, it is quite clear that the legal term, obscenity, has been associated historically with a variety of issues including but not limited to: offensive conduct, hate literature, masturbation fantasy novels, birth control information, crime comics, children's stories, nudist magazines and slasher films (see appendix 1). A third point dealing with variability also seems relevant. In outlining his thesis that pornography is not context dependent, Mr Justice Shannon chose to dismiss the points made by Professors Ezekiel or Boyanowski, the defence's experts, both of whom contended that there is a difference between "play-acting" and "reality", and more generally that context affects our judgement of what is obscene. In dismissing their testimony, more importantly, Shannon appears to repudiate some fifty years in terms of social scientific comprehension of the effects of media.[9] Simple input-output models of these effects were discarded as soon as researchers discovered that effects are mediated by the context of exposure. Though this conclusion is still being qualified, there are few researchers who would dare argue that context is irrelevant, and indeed some have argued rather persuasively that context is the most important determinant and the best predictor too of people's responses to media stimuli.[10] No utterance can be understood without appreciation of the context in which it occurs. No symbolic construction carries an unequivocal and unambiguous message that is unaffected by context. Nor would such a contextual interpretation of the "audience" be novel to Canadian obscenity law. One of the clearest statement in this regard is that of Justice Laskin, then of the Ontario Court of Appeal, who said in 1966, in the case of R.V.Cameron (DLR 58 (2) part 6 s14).

> It is fictional to look to the public as a whole. It is a relevant consideration here that the exhibition was directed to adults only; and even within the class of adults, the public response will not be general. The "public" must be considered in dimension to the matter in question.

Notwithstanding Laskin and consistent with his foregoing position on the non-contextual nature of obscenity, a position now further entrenched, though ambiguously so, by the recent Supreme Court decision in the Towne Cinema decision[11], Justice Shannon also tells us, as mentioned earlier, that the contemporary Canadian community "will tolerate erotica no matter how explicit it may be. It is the message that counts, not the degree of explicitness." And yet there is not now and has never been any empirical evidence as to what the "contemporary Canadian community will tolerate" nor what message they take from such films. There has only been lengthy debate concerning the appropriate reference group to be designated by this phrase.[12] In addition, there is considerable room for doubt concerning our ability to discover "the message" outside of the context in which it is communicated. Indeed, we would contend that Justice Shannon's statement is potentially most dangerous in terms of its implications, for it may suggest both that we will tolerate erotica without regard to its explicitness--as illustrated by his stance on "Greenhorn"--and also that we will not tolerate pornographic obscenity no matter how implicit. The major premise of such a position is that the identification of obscenity is unequivocal. And this identification rests in no way on the explicitness or the sexuality of the materials, since both the erotic and the obscene may be equally sexually explicit. According to Justice Shannon's ruling, the features that alone discriminate between the erotic and the obscene would seem to be the accompanying violence (whether explicit or implicit), or in the absence of violence, the degradation or dehumanization of the participants--both of which factors are credited whether the depiction is documentary or fantasy, whether the production is realistic or contrived.

There is little comfort here, in our view, since even violent, degrading and/or dehumanizing material are discernible as such only in their context. Sexuality, even explicit, aggressive sexuality, is often considered unobjectionable if it occurs within a saving context, whether of plot or of personal relationships where it might figure as "roughhousing," or wrestling.[13] Similarly, it is context that has historically weighed heavily in saving many books, movies and other depictions from being found obscene. Public sentiments appear to object to explicit sexuality that occurs without a legitimizing context, though in in pluralist society, we must

assume that audiences run the gamut in terms of their tolerance. In fact, even in the category accepted by Shannon--"explicit erotica"--this refers to a class of possibly explicit sexual productions that are saved from being obscene by virtue of the equal quality of the relationships in which that sexuality is embedded.[14] Surely it is ironic that the decision simultaneously treats the issue of obscenity as one that can be demonstrated without attention to context, one in which context is judged irrelevant, while defining erotica simultaneously in terms of its context. Pornography appears to be decontextualized sex, sex for sex' sake with neither affection nor equality. However, this attribution appears sound only in a heterosexual context. "Greenhorn", as gay sex, does not dehumanize or degrade the participants or persons at large, *if* we follow Mr. Justice Shannon. This double standard reinforces the view that it is sex between men and women which repudiates all the normal trappings of domestic life that comes in for heavy weather.

Finding and Defining Context: the Act, the Moral Operations and the Legal Status

What we propose to explore here is the notion that an act or any representation of an act is indexical[15] as to its significance, and that the meaning of an act results from invoking some background understanding, some message or meaning, some context in which it is to be read. In this view, fictional representations become pornographic or obscene, just as actual behaviours become simply or grossly indecent, by virtue of some invocation of the circumstances of their production and occurrence. There are various signposts in the decided cases which corroborate this view. In Lady Chatterly's Lover Judson J., speaking for the majority of the Supreme Court in a narrow decision quashing conviction, stressed that the meaning of a sexual episode had to be judged in the context of the work "taken as a whole," and within the internal requirements of the plot. Judson viewed the work as a serious literary endeavour, and the sexuality as erotic. Even so, subsequent charges were brought against other serious and not so serious literature--Tropic of Cancer, Fanny Hill, Last Exit to Brooklyn, and, for the most part, failed. Prosecution of the films, "Last Tango in Paris", and "Caligula" also failed, though many conservative groups would have removed the works of J.D. Salinger and Margaret Laurence from schools and/or libraries--perhaps wishing that their children would be content with Huckleberry Finn--a work which was found highly provocative by Samuel Clement's contemporaries.[16] Lenny Bruce was cocnvicted for obscene performances, as were Canadians, Maclean and Maclean. We tend to view the erotic quality of these works as unproblematic; however, they were the pornography of their day. It is evident that readers--whether

judges or laymen--took the basic works, applied a set of criteria to them, and situated the work within the moral boundaries as a result of this operation. That is the issue which we would like to elucidate in the erotica-pornography controversy. What operations are applied to the observations of sexual or other materials to render them on either side of the law?

Lessons From Gross Indecency

In order to get a sense of such operations, there is merit in considering an equally moralistic area in criminal law to explore how context is employed to draw the line there. We have chosen the area of gross indecency since it appears to be a sort of real worldly counterpart to the sorts of things which, had they been filmed, painted or written about in novels, would provide grist for investigations as obscenities in fiction. The offense of gross indeceny was introduced into the criminal code in 1927 to forbid sexual acts performed by males with males. In 1954, the law was revised to ensure equity by making the offense capable of commission by either gender.[17] The code did not define what constituted an act of gross indecency. As Mr. R.E. Megarry commented in 1955: "when a word as indefinite as 'gross' is coupled with a word as subjective and emotional as 'indecency,' there can be little of that precision which is so desirable in criminal law."[18] The parallels to the criteria of obscenity are quite obvious--Parliament created a taboo with severe penal consequences, employed common sense terms to circumscribe the taboo, then asked the judiciary to determine just which acts it actually proscribed. Most of the reported cases have involved fellatio, cunnilingus and masturbation--many of the same activities that many would classify as degrading pornography, particularly in Bill C-54, and possibly in Wagner.

In one of the first important cases to be reported, Regina v. P, Winnipeg police, in the execution of a search warrant for illegal liquor, arrested a man and a woman whom they observed at 2:00 AM in the morning engaged in fellatio in the well-lit kitchen of the man's home. The woman was wearing a fur coat, and "her dress was open to the navel and both breasts were fully exposed." She claimed to be the common law spouse of the man, and advised police that "because of a recent miscarriage she could not have normal sexual intercourse". However, the courts appear to have attached no value to this, particularly since she lived at another address.

What they did attach value to was the fact that the act was done in-doors--and even though the police could see the act from the vestibule

through a glass window in the front door, those involved had a right to infer that, at such a time of night, they were acting in private. There was another person present, but he was sleeping in a drunken stupor in a chair adjacent to the kitchen. Also, the act was heterosexual in nature. At that time under Canadian law, the same act involving two men was unlawful. Lupien v. The Queen represents this situation. In Lupien, the charge was attempting to commit an act of gross indecency. Police had followed Lupien and a female impersonator from a bar to a motel, heard male voices coming from the room, obtained a pass key to investigate and found both Lupien and the female impersonator naked on the bed. Lupien, hot with passion, was apparently poised to engage in fellatio with this person. Lupien's defense was that he believed the person to be a woman--in which case the act would not be grossly indecent. The legal issue dealt with the admissibility of psychiatric evidence about Lupien's aversion to homosexuality. However, the case reiterates that gross indecency was viewed as a mechanism to eradicate "unnatural sex acts" between males, acts which would be viewed as normal if conducted heterosexually.

The final issue in R. v P, our earlier case, concerned whether those engaged in the act were consenting to it. In a prior case from the same Manitoba court, R. v LeFrancois, Miller, C.J.M., had held that LeFrancois's "conduct was so repugnant to ordinary standards of morality and decency that it cannot be called other than grossly indecent. The accused's behaviour was unnatural and depraved and violated the common standards of conduct accepted by the people of our land." This was also the view of Monnin, J.A., in his dissenting judgement in R. v. P. Miller, and later Monnin, held that because the act was so vile, it was immaterial whether consent was given or not. This moral absolutism is similar to the proposition that it is possible to differentiate pornography from erotic simply with reference to the meanings conveyed by the materials. In the LeFrancois case, consent was never an issue, since the victim was sexually assaulted. Dickson, J.A., (as he then was) pointed out that "the comment of Miller, C.J.M., on what would have been the situation if the act had been with her consent was not the expression of a legal proposition which was a necessary step to the judgment pronounced and was, therefore *obiter*." Consequently, the fact that consent was present was viewed as relevant to determining the meaning of the act. Monnin seemed to take the same black and white approach as Miller, arguing that fellatio and cunnilingus are crimes against nature, and in and of themselves criminal irrespective of context. However, this minority view has not enjoyed subsequent support. In summary, the contextual details identified in R. v. P. which undermined the classification as gross indecency were privacy, consent--and indirectly, age to give consent--and, finally, heterosexuality. There was also some

inferences about the objectives of Parliament in introducing the law, inferences which also relate to the issue of privacy and marital sex. In the words of the decision,

> "an act of fellatio between a male and a female may constitute gross indecency depending on time, place and circumstances. But Parliament never intended by s. 149 of the Criminal Code to attach criminal sanctions to sexual acts done in private by consenting adults of different sex."

It is this recognition of the importance of "time, place and circumstances" which appears to be missing in the absolutist fashion in which some observers propose to draw the pornography-erotica distinction. The various issues outlined in R. v. P. have been subject to further amplification. Parliament changed the Code in 1969 to exempt spouses as well as consenting adults over the age of 21 from gross indecency charges.[19] In Regina v. St Pierre[20], a 30 year old male was charged as a result of an act of cunnilingus with a 17 year old female. The Ontario Court of Appeal suggested that though the age of the victim did not provide protection from the charge, since she was not old enough to give consent, the issue of consent was nonetheless relevant as part of the surrounding circumstances which could be drawn on to determine if that act under those circumstances was grossly indecent. By inference, even if the persons were not formally permitted to consent as a result of age (and hence protected from prosecution), consent would still be relevant in understanding the nature of the act, and could figure as a defense that it was accordingly not grossly indecent.

In R. v. Quesnel and Quesnel[21], the Ontario Court of Appeal attempted a more categorical specification of gross indecency. It advised that the mere fact that cunnilingus or fellatio occurred would not lead automatically to a finding of guilt. "The jury must also be instructed that gross indecency may be defined as a marked departure from decent conduct expected of the average Canadian in the circumstances that existed...it is not to be a subjective approach where the result would be dependent upon and varying with the personal taste and predilections of the particular juror." Ironically, the decision appeared to go in the direction of community standards--the very thing which the courts, in the obscenity side of things, were finding problematic. Later cases involved the sexual victimization of children[22] for whom consent was meaningless. There were other cases which stressed sexual conformity found in the Lupin case. Most recently, in R. v. Pinard and Maltais, (1982) two men were convicted of

gross indecency following a raid on a gay bath house. "Evidence showed that one of the co-accused was masturbating in a doorway while the other accused placed his finger in his anus." In this case, the court found the act of indecent touching "intrinsically one of gross indecency", while the act of masturbation, though not intrinsically indecent, was "in the circumstances and the local in which it was committed...an act of gross indecency."

In the 1980s, when the anti-soliciting law was effectively unenforceable, the vast majority of charges laid under the gross indecency law have been applied against prostitutes who have propositioned undercover police decoys. The issue in such cases has been the commission of a sex act in a car, usually oral sex, in broad daylight.[23] Other charges have arisen from exposing the genitals while in a car in broad daylight,[24] though even here, allowances have been made for persons caught in "flagrante delecto" who have been young persons engaged to be married.[25]

The gross indeceny act has been removed from the Criminal Code as a result of Bill C-15.[26] Nonetheless, it provides an interesting parallel to how the courts have invoked the circumstances of acts to assign them moral and legal status, contrary to the tendency in Wagner, to hold that the moral and legal status of some of the very same acts--now portrayed as fiction for sexual amusement--is knowable categorically.

Gross Indecency versus Obscenity: A Closer Look at the Negotiation of Meaning.

In both the case of indecent exposure and of obscenity, a complaint must be initiated by an observer who is prepared to object to the nature of the act or thing in question. This operation calls into question the nature of the act or material.[27] It is not sufficient for the successful labelling of this act or material, and a great deal of the debate in the field of deviance concerns the extent to which the label reflects and requires an underlying characteristic of the phenomenon that differentiates it from the "normal" or non-deviant, or represents only a "political" difference in the resources related to labelling itself rather than any "true" difference in the phenomenon. The debate in deviance (concerning white collar and corporate crime, juvenile delinquency, social control and stratification, for example) seems identical to that in respect of obscenity. Differential liability to both initial and successful prosecution is directly related to social status.[28]

In the cases of gross indecency discussed above, the acts per se have been judged neither self-evident nor sufficient to establish guilt. Evidence

must be led in support of the charge, thereby enabling the relevant parties (the magistrates) to characterize the "facts" appropriately in their context. It is clear from our review of some of these recent judgments that *privacy, maturity, consent and heterosexuality* are relevant dimensions of this context. That is, the courts have often suggested that some act might or might not be grossly indecent depending on whether it was done in public or private, whether it was done between consenting partners or not, or whether it was engaged in by men or between men and women. The courts have also said that nudity is not itself immoral or indecent,[29] that nude dancing in public is not necessarily indecent,[30] (nor is streaking,[31] mooning,[32] nude swimming or sunbathing)[33] and that those engaging in fellatio,[34] cunnilingus[35] or masturbation[36] are not necessarily guilty of gross indecency.

Yet, somewhat ironically, if one were to film or describe the events categorized above, and if a complaint were laid, one might well face charges of manufacturing or trafficking in obscenity. How do we negotiate the transformation of acts which are not grossly indecent per se into pornography recognizable unequivocally as such?

Sociological Issues in the Construction of Evidence:

1. Intent versus Effects

We begin by noting that the actor's "definition of the situation" appears not to be relevant in determinations of obscenity though it is critical in establishing gross indecency. Presumably the director, producer, film editor or photographer could transform a film or photo into something obscene though it was not experienced as grossly indecent by the actors involved. Certainly, the opposite is also true. We routinely seek to transform material from X to R ratings with snips of the scissors by editor or censor. In the case of obscenity then it is therefore the film makers' intentions that would seem relevant, rather than the viewers' intentions. But unlike other criminal law, *'mens rea'* is not stipulated in these areas; the production is considered on its merits. The actors' definition of the situation is irrelevant because it can be easily transformed by the director. Yet, the director's definition of the situation too is deemed irrelevant because the acts allegedly carry their own meaning.

If we look at actual decisions more closely, it is clear that meanings and messages are still assigned to the materials in the absence of knowledge about what the film maker intended, and that there is debate about these meanings and messages. Thus, descriptions or depictions of fellatio or anal intercourse (or anything else) may be alleged to be obscene

for any of three classes of reasons. In the first category, some people (complainants, experts or magistrates) may assert that such acts are *inherently* degrading and dehumanizing. By virtue of their expertise they can distinguish the obscene from the non-obscene by inspection of the materials alone, with no reference to the meanings intended or experienced by either subjects or producers. If pressed, these people may assert a second and more sociological criterion, holding that the materials in question so clearly depart from the "community standards" or norms of conduct that their message or meaning is clear to any member, and requires no confirmation by direct evidence from subjects, consumers or producers.[37] Typically, where subjects, directors or consumers might disagree with this characterization of the material, they will be discounted by virtue of possessing "false consciousness" or moral depravity, simply being mistaken or ignorant of the true nature of the materials.[38] It is irrelevant what the actors in the film say actually was transpiring (e.g.. that what appears to be happening is really only simulated) and irrelevant what the producer had in mind (e.g. fantasy, social criticism, spoof or documentary). In the event that we are persuaded neither of the inherently obscene nature of the acts nor of their location beyond the pale of community standards, the "expert" may be called upon to shift the discourse to a more abstract level, interpreting "the essential message" of the materials as obscene. The expert locates this message as residing inherently in the product. Thus, we may be told that the "real message" is that women are objects to be used by men for sex, and otherwise worthless. But how are the experts able to distinguish what we cannot?

It appears to us that the current argument appears to be that *analysis of its effects can tell us the nature of the message.* If men who are exposed to pornography have less commitment to equality for women after exposure than before, then the message must have been that women are subordinate. If such men are more willing than before to tolerate violence directed at women, then the message must have been that this violence is acceptable. For men to express such beliefs and attitudes, the films must have been dehumanizing and degrading.[39] Whatever their legal currency, such inferences are logical non sequitors known as the fallacy of affirming the consequent. As to the assertion that such acts fall outside community standards, the question of whether evidence as to contemporary Canadian standards is necessary in support of such testimony has been and continues to be a hopelessly divisive issue, particularly in the most recent case from the Supreme Court.[40]

Issues II: Frame Analysis

In his book Frame Analysis, Erving Goffman stresses the different kinds of involvement and investment that audiences have in different realities--on-going activities, fictional dramas, speeches, dreams etc. He deals likewise with the way in which the definition of realities are made precarious through challenges to the framework through which we are viewing the world. Presumably, with motion pictures which we define as fiction, we suspend judgment about the veracity of the world depicted. However, in the context of pornography, critics of the genre point out that the break from everyday life is frequently illusory. A snuff film or a film of an actual assault, rape or brutality is, in fact, a kind of "documentary". The activities depicted are grossly indecent or otherwise illegal in their own right (e.g homicide, rape). Such a film would be obscene, but this seems almost beside the point. Is it because it is a sexual "documentary" that it is obscene? If it were a simulation, would it be obscene? If the audience knew it to be a simulation, would it be obscene? Or would we presume that at some point, when considered as a fiction, the product was entitled to be judged by other aesthetic criteria by which fictions are customarily judged?

According to such a line of reasoning, exigencies of plot *may* be allowed to redeem a product otherwise concerned almost exclusively with depictions of sexual activities. But the category of obscenity applies particularly to fictional presentations, after all, so if there are to be any entries in this cell, (i.e. obscene) we must have ways of recognizing the differences between obscene fictions and non-obscene fictions. Perhaps the difference lies precisely in the existence of some other way of construing the product, other than as obscene. And this difference appears to open the question of the degree of plot or artistic merit that must be minimally present to salvage a fiction from being condemned as obscene. American jurisdictions have suggested that in effect if any latitude exists by which a fiction can be seen as other than obscene, then it cannot be found obscene. Only when there is no saving plot at all can a product be condemned. In Canada, we approached this position with Judson's criterion of "inner necessities of the plot" and invocation to judge the work "taken as a whole". This is a position that now seems in danger of being left behind. By his test, a work would have been found obscene only if there was no aesthetic justification for the sexual depictions in it, and then only if the concentration on sex exceeded community standards or involved harm. A work that dealt with sex within a context in terms of which it could be seen to be appropriate would be termed erotica. This attempted solution may appear to suggest a way out of our dilemma, but it does not.

Polsky suggests that the same product can be viewed in a multitude of ways, and further that

> I know of no evidence to indicate that people erotically interested in naturalistic descriptions of sex - whatever their age - are seriously impeded by, or even give much thought to, the over-all non-erotic context in which such descriptions might be embedded; and this applies to highly artistic works as well as any other.[41]

In the context of our discussion of framing, this amounts to the suggestion that different people are capable of re-framing a product regardless of the frame intended by the author, or the inner necessities of the plot. Frames can be imposed from "outside" the product itself, and depending on the intentions of the consumer, and this seems to create havoc with the argument that the product has any single inherent or preferred message. As Polsky puts it even more succinctly,

> the user of written pornography gets his pornography from "hard-core" literature or from erotic "art" literature; so far as he is concerned, the only significant difference is that in the latter he usually gets less for his money.[42]

To a fetishist, shoes may be erotic, or even pornographic, and to some feminists advertising for virtually any commercial product may be pornographic if women are involved. Any given product can have multiple meanings and messages for different audiences experiencing it under different conditions and coming to the experience from different backgrounds and with different expectations and standards. Art books may be treated as pornography by some consumers, and so may great fiction or film. This seems to push us back to the position that isolated scenes or frames taken out of context can constitute obscenity, but this is a route already travelled, and a counter-productive one that would seem to lead to intolerable levels of censorship. The alternative appears to involve recognition that aspects of allowable materials may be consumed as pornography by some audiences. The most relevant questions seem to concern ways of aiding these potential audiences in distinguishing them from one another.

The fact that materials in question may be exhibited and consumed voluntarily (only with consent), seen only in restricted audiences (privacy), and understood by consumers to be fiction or art (education) or fantasy (not documentary) would seem to be most relevant. These criteria are the analogues to the criteria of privacy, maturity, consent and heterosexuality

that save sexual acts from being dubbed grossly indecent. They do not at present appear to save photographs or films from charges of obscenity.[43]

Issue III: Legal Methods, the Message and the Audience

In his study of "the sociology of the cinema," Ian Jarvie[44] argues that passive audiences who merely soak up, as it were, the subject matter of films are a myth. "Crude negative evaluations of the mass media...are peddled by professors and priests alike. Most of them amount to little more than this: media watching is passive brainwash." According to this "hypodermic theory" of exposure, the audience is simply infected by propaganda for sex and violence. Jarvie argues, by contrast, that audiences are differentiated in their interests, that the film producers target their audiences and pre-test their products to reflect the consumer interests as well as their own returns on investment, and that audiences interpret the works in the context of a host of factors.[45] And so, while a particular audience may be an "unstructured group" at the time of a screening, the participants are not passive in the sense that they swallow whatever happens to be exhibited before them.

We have argued that in determining the legal status of real acts of indecency, situational factors are invoked. In the case of fictional materials considered under the obscene publications law, expert witnesses have been a recurrent feature of the environment. Though Dickson, J.A., as he then was, determined in Great West News that "the Courts have not found it necessary to call upon expert testimony to describe the standards of the community," he obviously did not anticipate the extraordinary way in which such expertise would be required to decipher the deep meanings of obscene publications.[46] Where the historical development of the cinema led to differentiation of audiences after the second world war,[47] the courts--at least in the case of obscene publications--have side-stepped this development and have invoked the views of experts to ascertain the significance and meaning of works charged under the obscene publications law, independently of the audiences intended for such films. There are several methodological issues or questions that stem from this.

First, in terms of legal or prosecutorial methodology, how has evidence of the value of obscene films been led by the Crown--what proof of community standards, internal plot consistency or self-evident demonstrations of undue exploitations have been established? Second, what reference point has been deployed by the courts to anchor their decisions? In other words, what audience has been invoked as the consumer of the work--the historical audiences who actually viewed the films in advance of the complaint? The proverbial rational person/average

Canadian who never viewed the film but might allow his or her neighbour to do so? The feminist concerned with the effects of media on womens' status? The religious zealot concerned about morals and salvation? The expert concerned about effects? Third and finally, what methods have been employed to differentiate the subject matter in the terms advanced by the pornography-erotica distinction? In this discussion, we believe that prosecutions have been dramatically influenced by the expertise of Jarvie's "professors," that this has resulted in a distortion of the audience sociologically competent to decide the issues before the courts, and, finally, that the academic approach, contrary to the scientific auspices under which the expertise is given, is "fraught with the dangers of arbitrariness and lack of testability."[48]

Leading Evidence And Expertise

It has become common practice in obscenity prosecutions to simply display the subject matter charged as obscenity before the court. Virtually all prosecutions in anglophone Canada are conducted before a trial judge sitting as the trier of fact. Accordingly, in the Alberta prosecutions of "Caligula," "Dracula Sucks," "Candy Stripers," etc., the Crown case consisted of showing the films at issue, suitably contexted and revilfied. In Wagner, this was amplified by the expert witness alleging that films of the type shown in court had negative behavioural and attitudinal effects. The films were differentiated into various sorts of pornography according to attitudinal and behavioural criteria outlined earlier. Subsequently, the expert evidence consisted of summaries of the plots, together with a professional opinion about the "messages" of the various sorts of pornography as evidenced in the films at issue. By virtue of this procedure, the exhibits prosecuted for common law reasons (undue exploitation) were made answerable to charges of negative behavioural and attitudinal effects measured for comparable specimens studied in the lab.

Methodologically, this procedure of leading behavioural evidence plays havoc with the context sensitive approaches found in the trials for gross indecency. In those trials, the acts were described, and the extenuating circumstances--if any--were identified. Furthermore, the approach obfuscates the real audiences of pornography consumption, and the contexts of their consumption, and substitutes for them the expert opinion based on exposure outcomes. By way of illustration, Ned Polsky identifies sexual fantasy and masturbation as the primary context motivating the purchase of pornography, particularly by youthful male audiences. The pornography which Polsky's essay refers to is the "dirty

pages" in the 1950s novels of Erskine Caldwell, i.e. several scattered paragraphs of suggestive sexuality in books like God's Little Acre, paragraphs which did not even describe nudity, but which were read for their sexually cathartic interest.[49] If there were a trial today of such material, it would be immaterial that the subject matter promoted lawful sexual activity--masturbation--since the in situ relevance has been eclipsed, first, by the direct exposure of the court to the materials, and second, by the invocation of the expertise of academics to place a cultural and behavioural significance on the activities represented in the work.

Interpreting the Message

We have alluded to the procedure of leading evidence. How does the expert decide about the harmfulness of the subject matter? There have been numerous recent studies dealing with the effects of exposure to pornography. We have examined them elsewhere and found little merit to the authority attributed to them.[50] Even so, in terms of the methodology explored at trial, the procedure appears to be the following: the expert describes the nature of the effects reported as a result of the experimental studies, then classifies the materials charged in terms of the lab work to establish an equivalence. This is not always unproblematic inasmuch as some research has employed non-explicit materials (Steve McQueen and Eli McGraw in "The Getaway") to argue for the effects of explicit materials (hard-core pornography). Such material may be more potent by virtue of its violence than of its sexual explicitness. Also, one of the chief studies to be conducted to date--Zillmann and Bryant--employed excerpts from explicit porno trade sources which did not, as of 1982, depict domination, degradation, aggression against or victimization of females. These materials were deemed nonetheless to be "pornographic," when they would seem, on the basis of the descriptions, to have been "erotic." The effects, as adduced by the expert were, in any case, always negative--in terms of psychological attitiudes and behaviours.[51]

The last task here is to characterize the method of demonstration which has arisen in the Canadian courts regarding the message of pornography. In the following, it is evident that whatever native meaning might have been discovered by an actual audience viewing material in situ, the expert is allowed to substitute for this the meaning assigned by another audience, though one not well defined at the time of the testimony.

For the purpose of illustration, we rely on materials from the Wagner trial which we take to be representative of the directions in this area.

Here is the evidence of the expert in that case, outlining the film plot along with its significance:

> The next tape I will discuss is the tape titled "Candy Stripe", and the primary violent sequence within it is--there's two actually. There is one where the man is the aggressor and one where the women is the aggressor, where a man and, in the second sequence, a woman inserts both of her fists into another woman's vagina. Now this is obviously going to be, for the average person, an incredibly painful experience and cause a great deal of damage. In fact, you can see that the actress is wincing in pain and is barely able to tolerate this herself. If it wasn't for her anatomy, she would be severely injured. However, the portrayal is that she loves this, okay? Her acting script is to portray that she is highly sexually aroused by having two fists inserted into her vagina and that this is an enjoyable activity.
>
> Interestingly, there is a song in the background during this tape which is singing, "It Hurts," and you have to pay attention to it. But it is clear that the message is there, that this is a painful activity which women will willingly submit to." (R. v. Wagner, 1984, p. 249)

How is it that the expert can defend his interpretation and generalize in this fashion? What set of rules or paradigm warrants this interpretation? Certainly, no rules are identified. More importantly, there is no exploration of alternative interpretations, or a search for elements in the scene that are inconsistent with the interpretation. Consequently, there are no procedures to ensure that the interpretation given is the best of the alternatives. It is not tested, even in a cursory manner. The expert takes the figure of a woman in a fantasy, and equates her as representative of all women, not in fantasies--but women in real life. All women, we are told, will willingly submit to pain, to sexual domination. The universalistic tone of such an aphorism, particularly since it appears to fly in the face of what we know about real women in everyday life, is surprising. And accepting the translation for the sake of argument, does it make sense to ask who scripted such a message, and can this process be demystified? Was this done deliberately by the director? is it an inadvertent consequence of poor plot development? is it the natural outcome of focusing on sex from the perspective of the male viewer? None of these methodological issues are addressed in the anti-pornography

aesthetics. This has been recorded by another observer of such proceedings. Lacombe (1988:101-102) suggests that one of the limitations of the anti-pornography discourse "is its adoption of a reductionistic reading of the relationship between text and meaning. The discourse posits a one to one correspondence between pornographic presentations and meanings...the [translation] does not allow for interpretation."

Sheila Noonan provides a representative "reading" of the feminist aesthetics. "From the feminist perspective, it is not the sexual element but rather the ideology of pornography which is harmful. Pornography contains representations of power which entrench male values, advocate male hegemony, and perpetuate a system of male dominance by legitimating violence and objectification in sexual relations."[52]

One of the tests of the credibility of an interpretation is the adequacy with which it deals with the presenting details. In the case at hand, the expert's translation does not attend to why the actress, who is supposed to exemplify the willingness of all women to submit to pain, is wincing, and why the music, which we are advised to pay attention to, says "it hurts." Are not these advisements telling the audience not to mimic this conduct since it is painful? When we see a spectacle--which is surely what fisting represents--one of the normal assumptions viewers make is that the behaviour is distinctly precarious, and that most persons will be reluctant to mimic it. The logic of the expert seems to suggest that, if we see a film of someone swallowing a sword, everyone will willingly swallow swords. However, we find no generalizations that apply to everyone--only of lessons taken by males for the subjugation of females. In the fisting example, though the acts are performed both by a male and a female, relevance appears to be attached only to the heterosexual, not the lesbian encounter.

The same facile application of meaning is evident in the following. In his review of Candy Stripers and the Senator's Daughter, the expert stresses that the nurses are degraded by having their professional status, as presented in the theme of the film, downgraded by the pornographic theme. In this case, it involved the creation of a mechnical sex organ.

> Then at the end of the film...there is the proverbial gang-bang between the technicians who developed this penis and the only woman technician who is there. Again, she is professional. She is dressed in a white lab coat. But as soon as it comes time to celebrate, they gang-bang her. And, in fact, one of the technicians is locked up in the control room and he doesn't get to get involved, and he is

> complaining about having "sloppy fourths." Again, the evidence is that women are to be valued by how tight and unused their vagina is, and not for their qualities as a human being, or as a technician, or whatever training and skills they have." (R. v Wagner, 1984, p.257-8)

It seems curious that we are enjoined to find offensive the fact that a fictional character who has been scripted to indulge unrealistic sexual fantasies and wish fulfillment is not viewed in other ways--"as a human being or as a technician." If professional status is scripted into the fantasies by casting the females as nurses, then their subsequent sexuality is seen to undermine their professional attributes. And in the absence of any markers of their professional standing, we are advised to find fault since they are not scripted as "human beings" since the script places little value on anything but their sexual involvement. The underlying agenda appears to be that sexuality ought to be insinuated into the ideology of romance and intimacy on the one hand, or the non-sexual attributes of women on the other. This logic is curious since the expert also acknowledges that there are recurrent recipes found in the genre--the "proverbial gangbang." If the action is so stereotypical, one wonders why we need any special theory of interpretation about the deep meanings of the films. Certainly, in genres like detective films, there is the proverbial car chase; slapstick has proverbial pie-throwing. Such recipes are so common that it should be relatively easy to identify their function as dramatic devices, though this is the sort of analysis which the expert studiously avoids.

In another film, "Open Nightly," there is talk of women and horses. Rather than inquire into the prevalence of animal imagery in intimate relations in everyday life ("my little chickadee", or the generic reference to "birds," i.e. young women; or "pussy," or "beaver"), the expert appears to presuppose that such language is unique to the films, and constitutes an offensive transposition when taken literally.

> "They refer to women as brood mares at several points. The master is having sex with the maid and he is the stallion. He calls her the brood mare saying, "It's time you were bred," okay? The message here is women are animals to be rutted upon and, basically, bred the way you would breed a dog or a cat or a horse." (R.v Wagner, 1984, p. 259)

The core of the testimony consists of translating what are contingent fictional portrayals and dramatic devices into social commentary about the

status of men and women in real life. If the film portrays "fisting," we are advised that, though it may be painful, women generally desire it, or alternatively, that all women will submit to it readily. If the protagonist fancies himself a stallion, and the maid a broodmare, then all women are breedlings like cats or dogs. In our view, it may or may not be true that "fisting" is painful, and dangerous. It may or may not be true that some audience members will try to persuade their partners to indulge their painful advances, and some spouses may or may not accomodate the sexual "perversions" of their partners. However, the idea that a general principle about the status of the sexes is being advanced via the sexual fantasy of an actor in a fictional script--i.e. that all women are to be rutted upon--further, that the principle impugns the credibility of women qua women--in this case by advancing the view that women are no different from cats of dogs (or at a higher level, that all heterosexuality becomes bestiality) and that this is the message read by some undifferentiated audience exposed to the fiction, is a series of inferences better suited to the delphic oracle than empirical psychology. The lesson in the expert testimony appears to be that analogy, irony, pathetic fallacy and other fictional devices are legally equated to negative, general characterizations of real persons in modern life, that individual female actors are to be viewed as portraying the status of all women in real life, and that whatsoever the manifest plot, its latent and more powerful message concerns the denigration of women vis-a-vis men.

One is reminded, at one level, of Freud's analysis of Leonardo da Vinci, and, at another, of Bryan Wilson Key's Subliminal Seduction.[53] In the case of Freud, there is the same psychological search for a deep meaning structure in the work of fantasy, and the equivalence of fantasy and fact to resolve some outstanding issues in the psychosexual development of Leonardo, particularly his homosexuality. Freud chose as his point of departure an analysis of a painting of the Virgin and Christ Child. The Child is shown sitting in the folds of the Virgin's clothing. Freud identifies the figure of a vulture loosely outlined in the folds of the gown, a figure attributed to the unconscious mind of the painter. Leonardo identified with the Christ Child and subconsciously left this record of his relationship to his own mother, a mother who was a vulture to him, whose rejection of him led to his own subsequent maladjustment. The only problem with Freud's analysis was that the painting he analyzed was subsequently attributed to another painter, rendering the entire meaning analysis void for Leonardo. Methodologically, the point is that this sort of meaning attribution, which is common in both Leonardo and the case at hand, has no internal checks, or limits, and leaves the door open for the most absurd kinds of attributions, as evident in the overvivid imagination

of Bryan Wilson Key. It presupposes the message on abstract grounds and assigns it to real appearances in the fashion we have described. Specifically, the deep messages are adduced from tests of exposure outomes in the lab, and applied via the most uncritical generalizations by the expert to a class of films never experienced in situ.

The Audiences and the Expert

There are various audiences to sexually explicit materials, including working class males, young males generally, as well as feminists. In the 1970s, pornography was identified in the writings of many femininsts as instrumental in the maintenance of gender inequality. Groups in the Britain, Canada and America assembled slide shows of the most offensive materials that could be found to raise the consciousness of women about pornography and its effects. Such groups advised that pornography was inherently violent, whether due to the sort of things depicted--S&M, B&D--or due to the nature of the relationship of those photographed and those consuming the end product,[54] that pornography was becoming more violent and degrading, that the violence was a deeply motivated backlash against women for their struggles for equality and respect, and that pornography promoted sexual aggression against women. As Jarvie suggests (1986:412), there was a point at which femininsts were required to take such propositions at face value, as a condition of membership in the women's movement, though clearly, the differentiation of the movement into more politically sensitive factions disputes this.[55] There has also been some accomodation in the women's movement to the sexual liberation of the '60s and '70s in the understanding that sexuality per se is a good thing, and consequently, that explicit sexuality in fiction, erotica, ought to be held separately from pornography, which was labeled the eroticization of domination. If pornography was the "linchpin of patriarchy," as Eva Kittay suggests, then erotica was liberating.[56]

The methodology of prosecution which has given priority to the effects experts has inadvertently redirected the audience and the interests which are adjudicated under the obscenity law. The in situ audience of working class males, the wish fulfillment audience which reads and views sexual materials in the context of masturbation, is occluded by ideologically more sophisticated viewers and readers. For the former, pornography is sexual fanatasy which has no more relevance for gender status than "Star Wars"; for the latter, pornography, despite its fantasy structure, constitutes hate promotion, sexism, and violence against women.[57] In our view, it is possible that fiction contains messages, even injunctions for real life.[58] It may well be established that obscene

materials have many messages, some pornographic, some erotic, some mixed, some manifest, some latent, and it may be that different messages are taken by different audiences. However, the consequence of the testimony from the effects experts is to construe the materials as though they contained only one message, that the message was dominant in the materials, that the message was dangerous, and that suppression of the message served the ends of justice. Certainly, this is the view of one audience. It is a view buttresed in part by the effects literature, and it is a view whose credibility rises and faslls with the accuracy of this literature. In breaking away from endemic community standards and from considerations of the internal necessity of the plot, blindness to these other audiences is undemocratic and elitist. Since we have identified grounds to dispute both the scientific conclusions constituting the expertise, and the courtroom manner in which the effects are assigned to particular materials through "message analysis," we are dismayed, not only at the outcome in Wagner, but about the whole future direction of the law of obscenity, since the pornography-obscenity distinction would now appear in danger of determination strictly on the basis of an outcome criterion which reflects the interests of a single ideological audience.

Several Unresolved Issues

In our discussion of the development of this most recent chapter of Canadian obscenity law, we have left several matters at loose ends. At this point, we can do little more than alert the reader to them. First is the issue of instrumentalism, second, the issue of erotica and its effects, and lastly, the issue of alternative measures to obscenity law, particularly the prospect of employing the federal hate promotion legislation to curb pornography.

Instrumentalism

At one point we had a fleeting laconic image that the whole Wagner trial was an immense formalistic charade, an Alice in Wonderland legal game played by partners with independent interests, all of which were met within the rules of the trial, but none of which was inherently authentic or good. The experts enjoyed exposure and credit by the recognition of their disciplinary prowess. There were able to conclude that their work, while academicly sound, was also legally relevant, and the credibility of the discipline was enhanced accordingly. The Judge, while holding his nose at much of such evidence, was nonetheless able to find in the testimony just as much of what could be dubbed evidence to strike a blow against smut in a rare written decision, thus ensuring his mark on the law. Feminists, thankful of the expertise and the judgment, applauded the

results, however perplexed by the testimony on which it was based. The defense, haggard after 10 days of court time, billed accordingly, and put up a noble struggle in defense of free speech. The prosecutor came out looking like a Knight of the Roundtable, a protector of the rights of the fairer sex. And for all this, poor Fred Wagner was fined only $250, and deducted his legal fees from his business income! Each player got to take the moral high ground--protecting free speech on the one side, doing dirt to evil on the other. What an extraordinary amount of social benefit at such a mimimal cost to all the key players.

We are aware that such a cynical characterization overstates the case. However, we are also aware that doing law, and doing good, are not equivalent. In other words, for all the players, the law is not the end in itself. Fixing the boundaries of obscenity is not an exercise in definitional clarification which, once decided, allows all the players to get along with their business. It is not an academic game. For all the parties involved, the law is an instrument, or a medium. Instrumentalism is our way of registering an appreciation of the larger social forces who are struggling in the legal context to advance their interests by recruiting judgments in their favour. The major players include the pornographers who have acted like elite opinion makers, or like fashion designers, leading the public into certain directions, competing with one another in terms of the sex-politics-lifestyle packaging which characterizes their magazines, market share and readership type, and through their competition, evolved the standards, as well as the diverties across the industry.[59] Feminists have entered the fray by scapegoating pornography as the source of discrimination while singing the praises of erotica--speaking censorship out of one cheek, enlightenment out of the other. The legal community has its own various rationales for acting--on the one hand to exercise civil libertarian ideals, on the other, to promote equity in society.

Instrumentalism was pertinent even in the earlier discussion of gross indecency where the majority of cases appear to consist of prosecutions directed at prostitutes. The law here was instrumental in the sense that gross indecency was invoked when police were unable to charge for simple soliciting. In R. v. P. one suspects that charges were laid as a result of failure to discover illicit liquor--the original reason for securing the search order, and that the police suspected the female in he brown fur coat was a hooker. Other prosecutions appear to have resulted from crackdowns on transvestite hookers (Queen v. Lupien), or on gay baths (R. v. Pinard and Maltais), or, in cases of rape where the actus reus would not support a rape or sexual assault charge (LeFrancois; Huntington). Consequently, the lesson we draw is that the decision to complain, arrest and prosecute is not based

simply on the presence of an infraction--for, as we have seen, it would take both an doctorate in psychology, and a peculiar sensibility not all that common on the planet Earth, to conduct the sort of expert translations reported in the Wagner decision which resulted in the conviction of all films save Greenhorn. A priori, the ability to classify films according to the law would appear to have been highly dubious. Consequently, the categories of taboo behaviours and fictions must be insinuated into the politics of public complaints and law enforcement, and the latter must appreciate the larger instrumental issues which take us from image construction by industry elites to the private practices of onanism among consumers, from the concerns for equal pay for work of equal value, to the issues of free speech, from the realm of personal fantasy to our worst fears about perverted assault and murder. In each realm, there are actors for whom one or another construction of sexuality is a decisive move in games we have not fully recovered. This larger social complex is the first obvious lacunae in our treatment of Wagner, and similar cases.

Erotica: What is the Linchpin of Patriarchy?

It is worth thinking through what we mean to achieve collectively by advancing the pornography-erotica distinction. At one level, the distinction is meant to signal a positive affirmation of sexuality as depicted in fiction. This is a message more closely aligned with liberal femininsts than with the religious right. Under the distinction, we would collectively expunge aggressive/violent sexuality, and degrading sexuality. What would be the hallmarks of the sexuality that remained in its place? At this point it is worth returning to the expert evidence in Wagner, since clues as to this sexuality are given in passing.

> "There's a very clear clue I tell people in identifying erotica. If the kind of affection that you see creates a good feeling in your mind, you are probably dealing with erotica as opposed to this other exchange. In other words, you can sometimes identify it on a mere gut level without having to actually look for specific behaviour and cues." (R. v. Wagner, 1984, p.265)

Other parts of the testimony suggested that particular acts such as fellatio, cunnilingus and anal intercourse would not necessarily be pornographic. Scenes which were produced to indicate that that the actresses were real persons, acting with equality and affection, would qualify as erotica, whether they resulted in buggery or not.[60]

There are two points we want to make here. First, where we are dealing with acts and situations which depart substantially from the sexual norms acknowledged by most Canadians, it will always be open to some audience member, with some instrumentalist objective, to register a complaint and initiate an investigation under the present obscenity law, or any other law which draws a principled distinction between pornography and erotica. Different audiences have different interests and, since they read the meaning of the acts in different ways, draw these lines differently. Also, the interests do not turn simply on the nature of the acts depicted, but also the degree of explicitness, and the evidence that the material is produced solely for sexual arousal. Liberal feminists appear to differ with the Christian right in terms of the priority of privacy in sexual matters. Explicitness, contrary to Wagner, is very much their concern. So whatever tranquility exists in Canadian vice departments is probably a result of the apathy of potential complainants,[61] since, at any point in time, in all the major cities, there exist questionable materials which, if found, would constitute the grist for someone's mill.[62]

The materials will also exercise individuals to the extent that they are available to younger persons, persons whose sexuality the 20th century has tried to repress, and who are consequently considered particularly vulnerable to sexual materials, even in the context of sex education.

So the lesson we are getting at here is that the pornography versus erotica distinction means different things to different audiences, and can be invoked simply to advance the morality of the complainant, and to re-emphasize the boundaries of normative sexuality as espoused by the group in question.

The second issue which warrants some discussion is tied more closely to feminism and the effects approach. The feminist movement targeted pornography in the 1970s as one of the leading exemplifications of sexism. According to Kittay, pornography was the linchpin of patriarchy. The Minneapolis By-Law makes similar intimations. Women are second class citizens, are discriminated against in housing, education and employment because of pornography. Remove the linchpin, and women will be liberated. H. L. Mencken once observed, "to every complex problem there is a simple solution and it is always wrong," a comment which seems a propos in this case.

Let us consider the ideology of erotica, and whether its consequences are liberating. Erotica appears to us to be the fictional version of what we

refer to as "romance" in everyday life. Erotica specifies that the fiction must treat the genders equally, which is to say, must situate explicit sexual encounters performed before a camera in a fashion which eliminates symbolic domination, on the one hand, and adds scenes of affection, on the other. In everyday life in modern patriarchal society, we employ romance to channel and regulate heterosexual affiliation. Marriages are made and broken to achieve romance. We make collective efforts to channel sexuality within marriage, and to confine our romantic sexual conduct to private, voluntary, monogamous, heterosexual encounters in the "master" bedroom. This is the hegemonic form of sexual expression in modern society, and our point is that, if we are attempting to expurgate pornography to protect erotica, in fact we are attempting to reinforce the dominant sexual mores in what is loosely described as "patriarchal society." In this view, erotica is the linchpin of patriarchy, not pornography. Furthermore, if one were to seriously undertake the outcome effects approach, if we were trying to explain the dominant forms of gender behaviour in society, why would we focus on the pornographic magazine market which is read by a small minority in the society, overlooking the sorts of exposure which are the cultural mainstay. The top 14 best selling magazines in Canada are virtually all women's magazines. If the mass media teaches lessons, if messages are consequential for the relative social standing of men and women, why have we overlooked this far more pervasive source of socialization in attempts to explain the status of women? We are not thinking here of the idea that housewives are depicted as idiots in detergent commercials, or that shapely bodies are used to sell automobiles. We are thinking of all the normal roles, the intelligent roles into which the actresses are cast, the preoccupation with romance in women's fiction from the soaps, to Harlequin romance, to the Hollywood tabloids chronicling the latest romances of the stars. If we are correct about the fetish for heterosexual romance in the mass media, it is a mystery why feminists would find an interest in protecting this ideology which is the most powerful determinant of the experience of sexuality in modern society.

In another context, it is interesting to note that some feminists have refused to acknowledge this ideology, precisely because of its links to the gender division of labour in society. We learned this as a result of interviews with officials in the Calgary Elizabeth Fry Society in the context of a study of prostitution. The E. Fry Society does not take a position which condemns prostitution for a variety of reasons--including that to do so would be to endorse the notion that only sexuality in the context of intimacy is legitimate. Obviously, prostitutes can and do compartmentalize their personal and professional love lives, and pursue sexuality as a form

of work. And while some feminists are quick to dub the form of life as exploitative by nature, this was a view repudiated by the sex trade workers themselves in a conference with feminists held in Toronto in 1986, since it was far from evident that persons working as hookers were there without any other choice, and, on the positive side, it was evident to the workers themselves that they were doing valuable work, much needed work which enhanced the well-being of the community. In the words of Margo St. James, "why should the women be considered deviant because they're separating sex and love? I think separating sex and love is a good thing" (Bell, 1987:83).[63] Obviously, an army of male tricks thinks likewise. It is immaterial whether we agree or disagree with these sources. What is evident is that the simple solutions to gender inequality that are suggested by the scapegoating of pornography leave unexamined the way sexuality is distributed through our social institutions--the family and the brothel--and how ideologies such as erotica play a role in sustaining these patterns.

Education, Hate Promotion and Alternative Remedies

Pointing to education as an alternative to coercive legal intervention is an intuitive solution for civil libertarians and liberals. Don't prosecute; educate. In the area of sexuality, we find the prospects for major social impacts as a result of educating young persons in schools about rape myths, about healthy sexuality and about the value of gender equality rather bleak. In North America today there is a tremendous resistance to sex education, precisely because parents with a multitude of divergent perspectives on the value of sexuality, and its relationship to marriage and reproduction, fear that the public schools, with their secular humanistic mandate, will give the wrong message, and will encourage promiscuity, teen pregnancies, STD's--and the other things which liberals view as the consequences of <u>not</u> giving sound and thorough sex education. And while more openness and frankness might demystify sexuality and lead to less repression, at least one aspect of the education of youngsters which is allowed--so-called street proofing of youngsters against sexual abuse by their elders--instills misgivings about sexuality. Finally, there is a tremendous ideological issue of what should be taught as the truthfulness of sex. Do we teach that "all men are rapists or potential rapist"? that "rape is the way in which all women or held in check by all men"?--or some of the other gems of feminist insight? Do we teach that homosexuality is natural and ordinary? That abortion is a simple medical procedure without moral aspects? The prospects for consensus here are not good, particularly where there is disagreement in the society over just these issues. However, not all education is futile. Some of the experimentalists advise that subjects can be educated about the values

which pornography inculcates through massive debriefings of the subjects. Debriefing the society at large is another matter.

In our view, given the instrumentalism of complaints over pornography, and the interests which groups or audiences are trying to advance through the courts, there is no alternative to legal remedies, remedies which influence the creators and marketers of sexual fiction. In this paper, we have dwelt on a case in which the use of expertise to decide matters of fact may have been foolish. Even so, the judicial framework is valuable, particularly where the trier of fact is called to adjudicate claims of harmfulness, as opposed to insoluble questions of morality, since the former is, in principle, a matter capable of demonstration, while the latter is not.

A final note on the legal remedy. A great deal of thought has been directed towards the use of hate promotion legislation to combat pornography which is held to materially hurt individual women, or women as a group. The hate promotion legislation in Canada was modelled on the tort for defamation and libel action in civil law. "In civil libel, injury need not be proven. It is assumed."[64] However, a review of the actual impact on reputation is required even in the civil law in order to assess damages. In the recent decision in the case of Queen v. Keegstra (1988), the Alberta Court of Appeal struck down the Canadian law controlling hate promotion as violative of the constitutional protection of free speech. Keegstra was an Alberta teacher who taught his students that the holocaust never occurred, and that world history was being governed by an international Jewish conspiracy.[65] For our purposes, the element of the law which is most interesting, and which the court found wanting, was that a conviction could be registered even if no one believed the lies, even if no one became, however slightly, (more) antisemitic, in other words, even if there was no effect.[66]

At the present time, gender is not an enumerated category in the hate promotion law, though a re-draft of the legislation might extend protection to it, in which case, arguments that pornography degraded men or women as a class could be advanced under the hate promotion section of the code. However, the reasoning in the Keegstra case would suggest that to make such a prosecution succeed, especially where this would require a waving of a constitutional right, evidence would have to be produced that there was real harm to the group targeted, which takes us back, at least in part, to the present quandary in the obscenity law. In our view, if the case can be made that pornography is harmful, that the status of women is demonstrably undermined by it, and that it contributes to the

material inequality of the sexes, we would applaud the override of free speech in this area, whether under the current obscenity law or a future hate promotion law. However, the evidence of such harm must be established on stronger empirical grounds than the social science voodoo we have reviewed in Wagner.

Appendix 1: Where we have drawn the line in the past

In one of the first reported cases in the history of obscenity law, Charles Sedley in 1663 was convicted for provocative behaviour; Sedley and his mates had become very intoxicated, were urinating in bottles and throwing them from a balcony at a crowd of people gathered to watch their antics.[67] They were convicted of obscene libel. In the 19th century, pornography appears to have been confined to an underground genre of sex fantasy novels, replete with images of ceremonial "deflowering" and flagellation.

The twentieth century has invoked the charge of pornography and obscenity to target the writings of adolescent magazines which went under the title of "Snappy Stories," "Telling Stories" and "Saucy Stories." Also targeted were the Dime Novels depicting the exploits of "Dead-Eye Dick," "Nick Carter," and "Jesse James." In 1923, the Public Health Journal (Toronto) launched a campaign to eradicate this "filth purveying medium."[68] According to the Journal, the magazines were "filled with stories of a dangerous character, most of them relating incidents, which not only have to do with sex, but which are told in such a way and from such an angle as to make any sensible reader conclude that the only safe method by which one can dispose of such muck, is to ban it from the mails altogether. Ones (sic) determination will probably not be lessened in the least by the information that these magazines are commonly snapped up with avidity by young school girls. A fine school for moral training they provide!"[69] The same sort of worries attended the motion pictures and the lurid posters used to advertise them; in Toronto, as early as 1917 there was a campaign to expose "The Menace of the Movies." [70]

In the 1930's moralists were exercised by publication of materials advocating the means of contraception on the one hand, and quack cures for restoration of the vitality of the sexual function on the other.[71] Also, the cult of nudity symbolized through publication of Health and Efficiency was targeted as offensive pornography. Crime comics and the social realist novels of the 30's and 40's--the lurid age of paperbacks--were dubbed the pornography of violence by Abram Kaplan in 1955, and were deemed to be a distinctive genre of popular literature.[72] Canadian criminal law was reformed in 1949 to outlaw crime comics as obscene publications; similar laws were passed through the Commonwealth and in many Western European countries. Since that period, attention has shifted away from written materials--though not entirely--and photomagazines, movies and videos have replaced earlier concerns. The slasher films seem to have replaced the dime novels and crime comics as the object of public

discussion. Given the course of pornographic history from De Sade to "Deep Throat", and the shifting focus on sexual fantasies, comics, and fertility control writings, the proposition, advanced by Mr. Justice Shannon, that we moderns can identify it unequivocally is indeed a courageous one. It is probably more accurate to say that the labels of condemnation--obscenity and pornography--have remained relatively invariant, but the materials which have found themselves inside and outside the taboo boundaries have changed.[73]

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[1] The Community standard's test became necessary with the 1959 revisions to the obscenity law. Prior to 1959, the courts employed the Hicklin rule which held that the test of obscenity was whether the tendency of the matter was to deprave and corrupt those into whose hands it fell and who were susceptible to such effects. The 1959 revisions to the Canadian law adopted changes which reflected reforms already incorporated into the criminal laws of several Australian states. Obscenity was defined as the "undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty or violence." Since due exploitation was clearly allowed, the community standard was invoked to draw the line between obscenity and lawful expression.

[2] The Senator's Daughter, Open Nightly, Barbara Broadcast, Amanda by Night, Candy Strippers, Greenhorn, Taboo II, American Desire.

[3] See Augustine Brannigan and Sheldon Goldenberg, "Social Science versus Jurisprudence in Wagner: The Study of Pornography, Harm and the Law of Obscenity in Canada," Canadian Journal of Sociology, Vol 11, No. 4, Winter, 1986, pp.419-431; and, of related interest, "Studies of Aggressive Pornography: The Vicissitudes of Relevance," Critical Studies in Mass Communications, Vol. 4 1987, pp.262-283; "Pornography Studies: the New Wave, A Review Essay", Law in Context, Vol.5, 1987,

pp.56-72. "Pornography and Behavior: Alternative Explanations," Journal of Communication, Vol. 37,No. 3, 1987, pp.185-192.

[4] D. Linz, S.D. Penrod, E. Donnerstein, "The Attorney General's Commission on Pornography:The Gaps between the "Findings" and Facts," American Bar Foundation Research Journal Vol 1987, no. 4, Winter, 1987, pp. 731-736. Also see Joseph Scott, "Book Reviews," Journal of Criminal Law and Criminology, Vol. 78, No. 4, pp. 1501-1521 for a review essay on the Meese Commission. Similar observations, though related to the Canadian Fraser Committee and Badgley Committee Reports, are made by William Fisher, "The Emperor Has No Clothes: On the Fraser and Badgley Committees' Rejection of Social Science Research on Pornography," pp. 161-173 in J. Lowman, et al, (editors), Regulating Sex, Burnaby, B.C.: Simon Fraser University School of Criminology.

[5] In our discussion, we have focused on Wagner, though the decision in the Red Hot Video case picked up on the philosophy of Wagner. R. v. Red Hot Video [1985,B.C.C.A.] 45 C.R. (3d) 36. Also see annotations to the following cases: Beverley Baines, "Annotation" Towne Cinema Theatres v. R. [1985, S.C.C.] 45 C.R. 3d 3; Sheila Noonan (1985), "Pornography: Preferring the Feminist Approach of the British Columbia Court of Appeal to that of the Fraser Committee," 45 C. R. (3d) 61-68; Sheila Noonan, "Annotation," R. v. Wagner (1985, A.Q.B) 43 C.R. (3d) 1985 319. The developing philosophy of Canadian courts is traced to Doug Rankine (1983) 36 C.R. (3d) 154; and Ramsingh (1984) 14 C.C.C. (3d) 230, each of which identified degradation and dehumanization as central elements offensive to community standards. Wagner was the first case to attempt a full differentiation of material on the basis of characteristics, employing expert evidence to legitimate the classification. In Red Hot Video, there does not seem to have been reliance on such testimony; in the Court of Appeal, great importance was attached to the expert evidence obtained in Wagner. The scenario suggested is that the distinctions between explicit and degrading material may have been developed in advance of the psychological evidence later employed to give the definitions some evidentiary weight.

[6] Towne Cinema Theatres Ltd v. The Queen (1985) 18 C.C.C. 3d 193. In point of fact, the key issue in this case was the failure of the trial judge to apply an objective standard. Comments about the "social harm" of pornography are questions of fact, and may prove to be *obiter*.

[7] Report of the Special Committee on Pornography and Prostitution, Ottawa: Supply and Services, 1985, Vol. 1, p. 99.

[8] R.E. Klugman, (Chairman) Report of the Joint Select Committee on Video Materials, Vol. 1 and 2, Canberra:Australian Government Publications, 1988. Volume One is the report of the majority--six panelists. Volume Two was the Chairman's draft of the majority report, but was only supported by five out of the eleven panelists. The major issue of contention was the value of social science evidence of harm.

[9] See Herbert Blumer, Movies and Conduct, New York, 1933; H. Blumer and P.M. Hauser, Movies, Delinquency and Crime, New York, 1933.

[10] See Thelma McCormack, "Regulating Morality and De-Regulating the Economy," Studies in Political Economy, 1984.

[11] 18 Canadian Criminal Cases 3d 193 (S.C.C. 1985)

[12] Cite Kierans, J.A., opinion in R. v. Hecker (1980) 58 C.C.C. 2d 66.

13 And it may be worth noting that just such an interpretation is the basis of American law on obscenity as established in Miller, whereby any redeeming value is sufficient to protect a production from charges of obscenity, without further reference to additional criteria like community standards. In Canada, a defense of artisitic merit, educational, scientific or public good is available under the current law, though these would be more restricted under the proposed legislation.

14 Beatrice Faust raises a similar point in the parallels between religious art depicting suffering and sadomasochistic pornography depicting bondage. Women, Sex and Pornography, Harmondsworth: Pengiun, 1980. See plates following p. 136.

15 Indexicality , a term coined by Bar-Hillel, refers to the context-dependence of natural utterances. The classic sociological discussion of indexicality is Harold Garfinkel, Studies in Ethnomethodology, Englewood Cliffs: Prentice Hall, 1967.

16 Check: The first edition was recalled following its release after numerous complaints about the engraved prints included in the text. Readers feared similar deviant and interracial escapades might be stimulated.

17 Unfortunately, by this change virtually any act undertaken by two lovers - even in privacy and even though they be man and wife - may turn out to be a legal offence, as noted in Sedgwick, J. in his article in the Canadian Bar Review, vol.33, no. 1., entitled "The New Criminal Code: Comments and Criticisms".

18 R.E. Megarry, Comment, 71 L.Q.R. 463 (1955).

19 R.S.C. 1968-69, c. 38, s. 7.

20 17 C.C.C. 2d 489 (1974)

21 51 C.C.C. 2d 270 (1979).

22 R. v. G. 70 C.C.C. 2d 24 (1982); R. v. Huntington 29 C.C.C. 3d 283 (1986)

23 In Winnipeg the charge was combined with the charge of counselling to commit an indictable offense, allowing an arrest on the basis of simple soliciting by a prostitute or a customer without the evidentiary problems of having to actually catch persons in the act. In 1986 the Manitoba Court of Appeal found that the combination charge was lawful after lower courts had thrown it out in at least two cases, including R. v. Burnette (unreported). Conviction by Mr. Justice Hanssen in Court of Queen's Bench--counselling being an indictable offense--was recorded in the Winnipeg Sun, April 27, 1986 and the Winnipeg Free Press, April 23, 1986. Appeal of this case, together with a juvenile case, to the Manitoba Court of Appeal was reported in the Winnipeg Free Press, June 10, 1986. The Appeal Court upheld the conviction.

24 R. v. McEwan, 4 Western Weekly Reports (1980, Sask. Prov Crt.) 85.

25 Regina v. J. (1957) 118 C.C.C. 30

26 Bill C-15 was passed by Parliament in 1987 and proclaimed on January 1, 1988. It deals with offenses against children, and describes the age of consent to sexual activities.

27. This situation guarantees that there will be instances in which the same act will not be found indecent (or material found obscene, since there will be no complaint filed). This is the exact equivalent to Becker's category of secret deviance in his well-known typology. It is equivalent as well in that it shares the same obvious problem; from a labelling perspective, the act can not be deviant unless and until successfully labelled as such, and thus the category of secret deviance is impossible since it involves a contradiction in terms. It is the operation that is alleged to make the act or subject deviant, just as in these instances, it is the operation that makes the act or material indecent or pornographic. It also follows from this third party

requirement that mistakes in the other direction can be made as well; that is, acts or materials may be prosecuted successfully without being obscene, at least in retrospect. This is Becker's category of the falsely accused. Since the label may succeed or fail independent of the quality of the act or material, it would seem clear that it is the act or operation that results in the designation, and the meaning is not inherent and unambiguous

28. A great many critics have suggested that it appears to be alleged lower class morality that is the object of social control by obscenity legislation, as it is alleged lower class deviance that is the target of most criminal law. One could suggest that the proposed feminist revisions of current legislation amount to an analogous redrawing the line such that obscenity becomes a class offence by men against women, and the law becomes a weapon of social control exercised by women in their interests.

29. R. v. Beaupre (1971) 7 C.C.C. 2d 230; Johnson v. the Queen (1973) 13 C.C.C. 2d 402.

30. Johnson v. the Queen, ibid.

31. R. v. Springer (1975) 24 C.C.C. 2d 56.

32. R. v. Hecker (1980) 58 C.C.C. 2d 66.

33. R v. Beaupre op. cit; R. v. Benolkin et al. (1977) 36 C.C.C. 2d 206.

34. R. v. P. 70 C.C.C. 2d 24

35. R. v. Quesnel and Quesnel (1979) 51 C.C.C. 2d 270.

36. R. v. Pinard and Maltais (1982) 5 C.C.C. 3d 460.

37. At this point, the parallel to gross indecency is very close again. (viz. R v LeFrancois), op. cit.

38. These rhetorical strategies for assessing counter-claims are of course by no means restricted to legal cases. But legal cases are not free of them either.

39. This logic constitutes a textbook example of the fallacy of affirming the consequent. If A (the message were that women are sex objects only and worthy of little respect as humans) then B (men would display callous attitudes after exposure to such a message). And B is found. i.e. men exposed to such a message do display such attitudes. Therefore A. The fallacy can be averted to the exent that rival hypotheses are identified and systematically discounted. To the extent that they can be adduced and not discounted, they remain rivals i.e. other plausible explanations for the observation of B. Our methodological critique of the experimental evidence is based on the identification of methodological or technical and theoretical rivals that have not been discounted and must therefore be taken seriously by those who would like to conclude that A is the cause of B.

40. In Towne Cinema Theatres Ltd. v. The Queen, 1985, supra note 6, Justices Dickson, Lamer and Le Dain argued that"the audience to which the allegedly obscene material is targeted must be relevant." Justices Beetz and Estey (McIntyre concurring, but in his own statement) argued that "the audience to which a film or other publication is exposed is not relevant to a consideration of whether it is obscene." Justice Wilson suggested that "the degree of certainty (required of criminal law) militates against a community standard test of undueness which varies with the targeted group".

41. N. Polsky, Hustler, Beats and Others, Doubleday Anchor, 1967, pp.195-6

42. ibid, p.194

43. Viewing within the privacy of the family is objected to on the grounds that children may still be exposed to it, with ensuing harm. But children are routinely exposed to dangerous items in a household from rat poison to sharp kitchen

implements. Nobody wants to eliminate the product to save the children, though we may hold the parents negligent if the children are harmed.

[44] Ian Jarvie, Towards a Sociology of the Cinema: A Comparative Essay on the Structure and Functioning of a Major Entertainment Industry, London: Routledge and Kegan Paul, 1970, p. 86.

[45] Jarvie's annotated bibliography cites the 1958 article by J.T. Klapper, "What We Know About Mass Communication: the Brink of Hope," Public Opinion Quarterly, Vol. 21, pp. 453-374. Jarvie summarizes Klapper's reservations about the relations that mediate audience exposure to portrayals of violent behaviour and subsequent audience behaviour. If any such relationship holds, it must examine the follwing sorts of parameters: "predispositions; self-selection; selective perception; contextual organization in the medium; audience image of the source; the passage of time; the group orientation of the audience member and the value he sets on group membership; the activity of opinion leaders; the social aspects of the situation during and after exposure and the degree to which the audience member has to play a role while exposed; the personality pattern, social class, and level of frustration of the audience memeber; the nature of the media under free enterprise and the existence of social mechanisms for implementing action drives." Cited in Jarvie (1970:301).

[46] R. v. Great West News Ltd (1970) 4 C.C.C. 307 at p. 314.

[47] In his review of the demise of the factory studio with its bevvy of contract stars, Jarvie argues that following the second world war, movie audiences became more differentiated. "What really happened was that the audience for the first time was able to speak. What it demanded was a *reason* for going to the pictures, i.e., *pictures* should be differentiated for it...The film received more care, more individual attention and was more closely designed for a special public: teenagers, families, and the middle-aged, etc. The audience had its ultimate weapon--to stay away." (p. 96).

[48] Ibid. p. 132.

[49] Ned Polsky, "On the Sociology of Pornography," pp. 183-200 in Hustlers, Beats and Others, New York: Anchor Books, 1969. Republished by the University of Chicago Press, 1986.

[50] They have also be criticized by H.B. McKay and D.J. Dolff. 1985, The Impact of Pornography: An Analysis of Research and Summary of Findings, Report 13, Working Papers on Pornography and Prostitution, Ottawa: Department of Justice; Thelma McCormack, 1985a "Making Sense of the Research on Pornography," pp. 181-205 in Varda Burstyn (ed.), Women Against Censorship, Vancouver and Toronto: Douglas and McIntyre; 1985b "Deregulating the Economy and Regulating Morality: The Political Economy of Censorship," Studies in Political Economy Vol. 18:173-185; *Steve Lab (1987)*, Brannigan and Goldenberg op. cit. note 3, Berl Kutchinsky, 1983 "Obscenity and Pornography: Behavioral Aspects," pp. 1079-1085 in Vol. III Sanford Kadish (ed.), Encyclopedia of Crime and Justice, New York: Free Press. 1985 "Pornography and its Effects in Denmark and the United States: A Rejoinder and Beyond," Comparative Social Research Vol. 8: 301-330., *Gray (1982), Gross (1983), Christensen (1986, 1987), Williams (1979), Klugman (1988, Vol. Two).*

[51] Dolf Zillmann and Jennings Bryant, "Pornography, Sexual Callousness and the Trivialization of Rape," Journal of Communication, Vol. 34, 1982, pp. 10-21. "All erotic films depicted heterosexual activities, mainly fellatio, cunnilingus, coition and anal intercourse. None of these activities entailed coersion or the deliberate infliction or reception of pain." Having specified the content in this fashion, it is ironic that the

authors then attribute serious attitudinal impacts. There is no discussion of what aspect of the films had the negative effects.

[52] See Noonan, 1985 article, note 5, supra.

[53] Sigmund Freud, Leonardo da Vinci, A Study in Psychosexuality, New York: Vintage Books, 1947. Brian Farrell has written a long introduction to a Pengiun edition of this work, which records the mistaken identification of the painting's authorship.; Bryan Wilson Key, Subliminal Seduction, Englewood Cliffs: Prentice-Hall, 1973.

[54] Susanne Kappeler, The Pornography of Representation, Minneapolis: University of Minnesota Press, 1986.

[55] See Varda Burstyn, Women Against Censorship, Toronto and Vancouver: Douglas and McIntyre, 1985.

[56] Eva Kittay, "Pornography and the Erotics of Domination," pp. 145-174 in C. Gould (ed.) Beyond Domination: Perspectives on Women and Philosophy, New Jersey: Rowman and Allenheld, 1983.

[57] This was the real reason for the paradox behind Greenhorn--the sexual depictions could not be conjugated into a message of gender interaction.

[58] On this count we disagree with Soble (1985) who claims that fiction is non-propositional. For example, we commonly contrue ethnic and religious jokes as a form of prejudice which denies, albeit in fictional form, a status or respect which the group qua group is entitled to enjoy.

[59] Ernest Mandel describes the process of internal and external product diversificatiion in the context of murder mysteries. Delightful Murder: A social history of the crime story, London:Pluto Press, 1984. In the context of men's magazines, Playboy has targeted the College male; Hustler, with its self-styled grass roots approach has targeted the blue collar reader; Penthouse has split the audience, taking the erotic explicitness farther than Playboy, but avoiding the image of grotty, working man honesty cultivated by Hustler.

[60] Last Tango in Paris comes to mind, though in its time it was prosecuted as obscenity, though unsuccessfully. However, in this film the sexuality was simulated.

[61] There is also the issue of pre-censorship by Canada Customs which removes materials in advance of appearance in this country.

[62] In Calgary, Catholic groups were exercised by the presence of magazines depicting oral sex. The Vice squad, with a copy of Wagner in hand, advised the complainants that it is not the explicitness of the work, but the message that counts. There was no message implying a degradation of women, that is to say, no message aside from the acts depicted, which complainants saw as self-evident degradation, since the acts were such that no self-respecting person would engage in them.

[63] Laura Bell (ed.), Good Girls, Bad Girls: Sex Trade Workers and Feminists Face to Face, Toronto: Women's Press, 1987.

[64] Queen and Keegstra, Alberta Court of Appeal, 6 June 1988, unreported written judgment, p.43.

[65] ibid.

[66] The second element was the reverse onus condition which required the accused to prove the truthfulness of his position, and which, if done sufficiently, would provide a defense of the charge. The Court argued that such a burden of proof should be with the Crown, i.e. the Crown shopuld have to prove the untruthfulness of the subject matter constituting the hate promotion.

67 Graham Parker, An Introduction to Criminal Law, Toronto: Methuen, 1987, pp. 62-63.

68 Editorial, "It is Time to Act," The Public Health Journal, Vol. XIV, June 1923, No. 6, pp. 289-290; September 1923, No. 9, pp. 430; November 1923, No. 11, pp. 518-522; December 1923, No. 12, pp. 529-530, 571; August 1925, No. 9, pp. 399-400.

69 Public Health Journal, June 1923, No. 6, p. 290.

70 Cited in Public Health Journal, August 1925, p. 399.

71 See Criminal Code of Canada, 1988, s. 159 (2) "Every one commits an offense who knowlingly, without lawful justification or excuse, (c) offers to sell, advertizes, publicizes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or representeds as a method of causiong abortion or miscarriage, or, (d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs." Also, see R. v. Palmer, (1937) LXVIII C.C.C. 20, a case in which a prosecution for dissemination of fertility control information was found to serve the public good.

72 A. Brannigan, "Crimes From Comics: The Social and Political Determinants of the Victorian Obscenity Law, 1938-1954," Australian and New Zealand Journal of Criminology, Vol. 19, 1986, pp. 23-41; "Mystification of the Innocents: Comics and Delinquency in Canada, 1931-1949," Criminal Justice History, Vol. 8, 1987, pp. 111-144.

73 Another issue is changes in the rhetoric justifying control. In both the age of syphilis and the age of AIDS, there have been oscillations between the dramatization of evil, and spectre of disease.